In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 342.

ROBERT R. YOUNG,
Petitioner,

vs.

THE HIGBEE COMPANY,
WILLIAM W. BOAG, and
J. F. POTTS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT,
J. F. POTTS,
In Reply to Memorandum for
The Securities and Exchange Commission.

J. FRED POTTS,
502 Auditorium Bldg.,
Cleveland, Ohio,

PAUL S. KNIGHT,
806 Williamson Bldg.,
Cleveland, Ohio,

Attorneys for Respondent,
J. F. Potts.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647

INDEX.

AUTHORITIES CITED.

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 342.

ROBERT R. YOUNG,

Petitioner,

vs.

THE HIGBEE COMPANY,
WILLIAM W. BOAG, and
J. F. POTTS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT, J. F. POTTS, In Reply to Memorandum for The Securities and Exchange Commission.

INTRODUCTORY STATEMENT

This brief is by way of reply to the Memorandum filed *amicus curiae* by the Securities and Exchange Commission. The only appearance which the Commission has seen fit to make, at any time prior to the filing of its Memorandum in support of the Petition for Writ of Certiorari, was before the Special Master, at which time the Commission took the position that the Bankruptcy Court was without jurisdiction to consider the issues raised by the application which is the subject matter of this controversy. (R. 9.) No exceptions were filed by it to the report of the Special Master. No appearance was made on its behalf either in the District Court or in the Circuit Court of Appeals.

STATEMENT.

The Memorandum filed by the Commission demonstrates a substantial lack of familiarity with both the evidence and the pleadings, due, without doubt, to the fact that the Commission's connection with the controversy was only casual.

(a) The assertion on page 4 of its Memorandum, that the Court below impliedly conceded that had Potts and Boag taken their appeal in a representative capacity and not as individuals, it would have been inequitable not to share with other stockholders the consideration they received for abandoning the appeal, is neither warranted by the per curiam opinion nor by the pleadings. The very grounds upon which petitioner seeks his relief as stated in his application and by the Court below is that Potts and Boag were acting in a representative capacity or were asserting a derivative right. (142 F. 2d 1004.) The Circuit Court of Appeals merely found that, since the evidence failed to support the grounds alleged in Petitioner's application, the relief sought upon those grounds was likewise denied. No other inference or implication can fairly be drawn from the per curiam opinion.

(b) The assertion on page 8 of the Commission's Memorandum that Potts and Boag realized much more than the improved position which they sought for themselves in the reorganized corporation and that the compromise was therefore not merely of the gains which they sought for themselves, but was necessarily a compromise of the gains which every stockholder participating in the reorganization would have received from a successful appeal, is not at all warranted either by any evidence that was before the Court nor by the extensive findings of fact made by the Special Master. Young, the petitioner here, had been invited by Potts to join in the latter's exception to the Plan of Reorganization and had refused. (F. 13, R.

242.) Thereafter Young brought suit against Bradley and Murphy asking that the equitable ownership of the Higbee Junior Indebtedness be declared to be his. (F. 14, R. 242.) After the institution of these proceedings Young notified Potts that his only interest would be in having Bradley and Murphy get all they could for their securities so that there would be that much more for Young to take away from them. (F. 15, R. 242.) On March 2, 1942, petitioner acquired the Bradley and Murphy note for $540,000.00 and the collateral pledged therewith which included the Higbee Junior Debt. (Finding 5, R. 240.) On the very next day, petitioner declared the note due and served notice of his intention to sell the collateral and to bid at the sale. (Finding 6, R. 240.) Under the peculiar provisions of the note relieving the holder from any duty to account to the makers for any overplus which the sale might produce, the holder of the note was in a position to bid in the collateral without any competition from any other bidders. (Finding 7, R. 241.) At this point, and for the first time, the appeal filed by Potts assumed a substantial strategic value because it was the only thing which might enable Young, without cost to himself, to take away from Bradley and Murphy the Higbee Junior Indebtedness. (F. 21, R. 242.) Prior to this time the appeal by Potts and Boag was of little importance "for it had been denied by the Master and the District Court and their appeal was generally considered without merit."[1] The purchase by Bradley and Murphy from Potts and Boag of the latter's holdings was not for the purpose of preventing the success of the Potts-Boag appeal but was solely to enable Bradley and Murphy to protect themselves against Young's scheme to deprive them of the benefits of their investment. (F. 28, R. 244.) The Courts below expressly found that the strategic value of the Potts-Boag stock was not only created solely by Young,

[1] Report of Special Master R. 230.

the petitioner here, but that he tried to persuade the respondents not to sell, and offered to meet any price which Bradley and Murphy might offer. (F. 20, R. 243; F. 26 and 27, R. 244.) The purchase by Bradley and Murphy of the Potts-Boag securities, in effect, resulted in the expeditious confirmation of the Plan of Reorganization (F. 28, R. 244) at a time when "The Higbee Company Plan of Reorganization long since had been confirmed and was acceptable to every interest except to * * * Potts and Boag." (R. 242.) There is no evidence in the record indicating the extent, if any, by which Potts and Boag profited by their sale to Bradley and Murphy. It is true that it represented $26,000 in face amount, upwards of $19,000 in past due dividends and, on the basis of the work out of the Reorganization Plan, something in excess of $50,000 in marketable securities. Moreover, there is no evidence of the amount of expenses incurred by Potts and Boag in the employment of auditors, the employment of court reporters, the printing of records and the employment of counsel. The record therefore does not support the statement of the Commission that Potts and Boag realized more than the improved position which they sought for themselves in the reorganized company. It is even debatable whether the success of their appeal would have inured to the benefit of the preferred stockholders to the extent of one dollar. The financial condition of the Company was such that the preferred stock was entirely sound, and preferred stockholders can ask for no more.

ARGUMENT.

It is the Commission's contention now, that although the Bankruptcy Act expressly authorizes any interested stockholder in a reorganization proceeding to appear on his own behalf, that such stockholder may not sell his holdings for more than their market value, without accounting to all other stockholders for all sums in excess of the market

value of the stock so sold. The logic of this position must go so far as to include a situation where the excepting stockholder had invited all other stockholders to join with him and share in the expense and responsibility of his proceeding (F. 10, R. 241); where every stockholder had refused to so join (F. 10, R. 241); where every other stockholder was interested in the expeditious final confirmation of the Plan of Reorganization (R. 252); where the Plan of Reorganization, after careful study by the Securities and Exchange Commission, had been found by the Commission to be fair and feasible (R. 79); where every interest except the excepting stockholder had long since confirmed and accepted the Plan of Reorganization (R. 252) and where the strategic value of the shareholder's holdings arose, not because of the legal merit of his appeal or the desire of any one to prevent the success of his appeal (R. 230) but because of the scheming of another stockholder (Young) who had refused to join in the appeal but nevertheless attempted unsuccessfully to make use of it for his own selfish benefit. (R. 243.) All of these facts existed.

The Commission now urges this Court to interpret the Bankruptcy Act so as to make entirely meaningless the individual right given to a small minority shareholder to assert his individual views where they may be in conflict with perhaps a powerful majority.[1] If Congress had intended that all of the burdens of a representative proceeding shall be imposed upon the individual stockholder, without its equivalent benefits, the language used in Section 206 would have been quite different than it appears in the footnote.

---

[1] Section 206: "The debtor, the indenture trustee, *and any* creditor or *stockholder* of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter * * *."

Section 209: "*Any* creditor or *stockholder may*, in a proceeding under this chapter, act in person, by an attorney at law, or by a duly authorized agent or committee."

In the case of *May v. Midwest Refining Co.*, 121 F. 2d 431,[2] the Circuit Court of Appeals, in effect, coercively required a shareholder to accept what in substance amounted to a settlement under similar circumstances although not involving the provisions of the Bankruptcy Act where the rights of individual shareholders are meticulously safeguarded. In that case the shareholder was required to accept $1246.22 as the dollar reimbursement for the damage to his stockholdings, but was awarded in addition thereto $43,146.27 for the expense, including attorney's fees, of conducting, singlehanded, the litigation which he believed necessary to protect his rights.

The Court, in commenting on the theory for which the Commission here contends, said (p. 440):

> "In our opinion Rule 23 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, which requires that actions of this sort shall not be dismissed or compromised without the approval of the Court and notice to all members of the class of which the plaintiff is one in such manner as the Court may direct, does not apply to the situation presented in the case at bar. The reason for this is that the rule is appropriate to, and so must have been designed to cope with a situation in which a dismissal or compromise of an action of this nature by a plaintiff would affect the rights of other members of the plaintiff's class, that is, to the situation presented when other members of the plaintiff's class have intervened, or when the wrongdoing corporation has sought to settle with the corporation which it has wronged instead of only with the individual plaintiff-stockholder who has brought suit, in either of which events the rights of other members of the plaintiff's class might be effected. But when, as here, no other stockholder has sought to intervene, and no compromise has been attempted with the allegedly wronged Midwest Refining Company, we

---

[2] Petition for Writ of Certiorari denied October 20, 1941, 314 U. S. 668.

fail to see how a compromise with the plaintiff alone could affect the rights of any one else."

The case of *Keller v. Wilson, et al.*, 174 Atl. 45 (Court of Chancery of Delaware, August 4, 1937) had occasion to deal with a similar question. An action had been brought by a shareholder claiming that an amendment to the corporation's charter providing its Class A stock to be automatically converted into common stock was invalid. The plaintiff asserted that the action was brought on behalf of himself and all other shareholders similarly situated. The case was tried and went to the highest court and returned for re-trial. At this point the plaintiff compromised his controversy and a stipulation of dismissal was prepared and filed. Before the dismissal stipulation was approved by that court another stockholder who had knowledge of the pendency of the proceedings but failed or refused to participate in them, sought to intervene and prevent the dismissal. The Court held that the plaintiff had a perfect right to control his own litigation even if it be assumed that it was a class action. The Court said:

> "Now the petitioner was aware almost from the commencement of this litigation of its pendency. He took no steps to intervene in the cause and thereby share the burden and expense of its prosecution. The complainants carried it through this court and up to the Supreme Court. When it was returned to this court and an answer put it in shape for a final hearing, the defendant concluded to make his peace with the complainants. The complainants were willing to settle the controversy, did so on terms satisfactory to themselves and stipulated for a dismissal. When the case had reached this late stage, the petitioner came forward and by his attempted intervention seeks to deprive the defendant of the result for which it paid in settlement."

In giving more than lip service to the policy of the law that encourages settlements, the Court said of this situation:

"This does not seem to me to be just. It is the policy of the law to encourage and favor settlements. If the last minute assertion, not of a right, but of a privilege known for as long as two years to exist, can be permitted to intervene to arrest the results of peaceful settlements, it would seem that parties in such cases as this could never negotiate a composition of their differences with any assurance that the terms of settlement could be carried out.

"The defendant bargained in its settlement for a dismissal of this particular suit, and I am of the opinion that the petitioner should not be permitted, upon hearing of the settlement, to inject himself between the defendant and the full enjoyment of the settlement's stipulated result."

CONCLUSION.

Since no new or novel question of law is presented—petitioner seeking solely to re-examine the facts which have thrice been determined against him—it is submitted with great respect that, notwithstanding the statement in the Commission's Memorandum to the contrary, no issue of public importance can arise over the question of whether petitioner, who was unsuccessful in his effort wrongfully to use respondent's appeal for the accomplishment of his own selfish purpose, can now participate in a benefit which arose, if at all, as the result of a proceeding in which petitioner not only refused to join and share in its responsibility (F. 13, R. 242), but which he hoped would be unsuccessful except to the extent that its pendency served his own purpose (F. 22, R. 243) and when he and every other preferred stockholder has received every benefit without any diminution whatsoever which is provided for under the terms of his conduct as a preferred stockholder with the Debtor in reorganization.

J. Fred Potts,
Paul S. Knight,
Attorneys for Respondent,
J. F. Potts.